U.S. Department of Labor

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Dated: October 19, 2000

Case No. 2000-STA-0040

In The Matter of

SAMUEL H. ROCKWELL
Complainant

v.

ALLIED SYSTEMS, Ltd.
Respondent

Samuel H. Rockwell, *pro se*

Kevin M. Ingham, Esq.
Atlanta, GA
For the Respondent

Before: JEFFREY TURECK
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under the Surface Transportation Assistance Act of 1982, 49 U.S.C. 31105 (1984) (hereafter "the Act"), and the applicable regulations at 29 C.F.R. Part 1978. Samuel H. Rockwell ("Complainant") filed a complaint with the Occupational Safety and Health Administration ("OSHA") of the United States Department of Labor on February 11, 2000 contending that he had been given letters of reprimand and was threatened with termination by his employer, Allied Systems Limited, in retaliation for refusing to operate his vehicle while he was too ill and fatigued to drive. A formal hearing was held in Portland, Oregon on August 29, 2000.

Findings of Fact and Conclusions of Law[1]

Respondent Allied Systems, Ltd. is in the business of transporting new vehicles that come into Portland, Oregon by boat and train to automobile dealerships throughout the northwest. It employs about 100 people, and transports 600 to 800 vehicles a day. It has employed the complainant as an automobile hauler for about two years, when it purchased the business at which the complainant had worked for the last 16 years (TR 27). In his job, complainant is responsible for picking up his truck at respondent's terminal, loading the vehicles at either the train terminals or the docks, and hauling them to their destinations.

Beginning not later than 1999, complainant had compiled a poor attendance record at work. Between the start of 1999 and the beginning of February, 2000, complainant had been off sick 22 days and off on personal business on 26 days (EX 1). This was in addition to his vacation time. He received a written warning notice on May 27, 1999 (EX 7) and another on September 11, 1999 (EX 5) regarding his excessive absenteeism due to illness. On September 21, 1999, the then-terminal manager, Mike Martin, and the assistant terminal manager, Mike Petrich,[2] held a meeting with the complainant and a union shop steward to try to find a solution for complainant's excessive absences. Complainant was offered time off to go for medical treatment (EX 6), but he did not elect to do so. Although neither Martin nor Petrich would say so directly, it is clear they believed either that the complainant was feigning illness to take days off or was asking for time off for illnesses that were minor and which they did not believe justified the use of sick leave (*cf*. EX 8). Complainant also received a written warning notice on February 24, 1999 for taking too long to load his truck on February 13, 1999 (EX 4).

On February 3, 2000, complainant was delivering new cars to Yakima, Washington, about 180 miles from Portland. He testified that the job took him longer than anticipated, and besides he was not feeling well, suffering from diarrhea. Generally, a delivery to Yakima is expected to be accomplished in a day, so that the driver can pick up another load the following morning. Complainant testified that on the afternoon of February 3rd, when he realized he was not going to be able to make it back by 9:00 a.m. on the morning of February 4th, he called the dispatcher back in Portland, Dave Sherwood, to advise him he would not be able to pick up a load the next morning (TR 30). Complainant admits he did not tell Sherwood he was ill (TR 67). He stated that Sherwood told him he would have to get back by 9:00 a.m. the next morning, and a load was being held for him (TR 31). But complainant testified that he stayed over in Yakima, and left at 6:00 a.m. on February 4th to drive back to Portland (TR 32).

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[1]Citations to the record of this proceeding will be abbreviated as follows: CX – Complainant's Exhibit; EX –Respondent's Exhibit's; TR – Hearing Transcript.

[2]Martin left Allied's employ in August to go to work for a competitor of Allied; Petrich is now the acting terminal manager.

He had to stop along the way because he was not feeling well, and did not make it back to the terminal in Portland until almost 11:00 a.m. (TR 33; EX 3). The load that had been assigned to him was still waiting. It was a shipment of eight vehicles to Albany and Lebanon, Oregon, a relatively short trip (TR 35-36).

When complainant was told the load had been held for him, he said he could not take it because he was sick (TR 33). At this point a discussion ensued between complainant and Martin, the terminal manager. Martin asked complainant if he was going to take the load, to which complainant responded he did not have the energy and he was sick. Martin again asked complainant if he was going to take the load, pointing out that the failure to take a load could lead to termination (TR 34, 107). Complainant then conferred with his shop steward, and either he or the shop steward conferred with other union officials. Complainant then proposed that he load the truck on the 4th and deliver it on the 5th. This was accepted by Martin (TR 107-08). Martin then told complainant that, with all the work they had to do, it was a shame he did not want to work harder *(see* EX 3).

Complainant left the terminal at about noon to load his truck, which should have taken between 2 ½ to 3 ½ hours (TR 138). Complainant testified that he had a great deal of trouble in loading the load, and did not finish until 6:00 p.m (TR 37-38). It should be pointed out that drivers are paid hourly for loading their trucks; accordingly, claimant worked for about three hours more than he should have. He then delivered the load the next day.

On February 14, 2000, complainant was issued another warning notice, for taking an excessive amount of time to load his truck (EX 2). Shortly thereafter, respondent notified complainant that it proposed to suspend him for one week beginning on March 10th. Complainant filed a grievance of this suspension with his union, and respondent withdrew the suspension.[3]

Complainant contends that respondent violated the law by insisting that he drive his vehicle while he had a reasonable apprehension of serious injury to himself and others if he was to drive while he was fatigued and ill. Further, he alleges that Martin threatened to fire him when he did not agree to drive the load on February 4th. Finally, he contends that the warning letter on February 13th was improperly issued as retaliation for his refusal to deliver the load on February 4th. However, since no action ultimately was taken by the respondent against the complainant arising out of the events of February 3-5, 2000, the only remedy which appears viable assuming complainant meets his burden of proof would be excising the February 13th warning letter from complainant's personnel file. It is respondent's position that complainant was not engaged in protected activity on February 4th; that no retaliatory action was taken for any protected activity which may have occurred on February 3-5; and that it did not threaten to fire complainant for refusing to drive his truck on February 4th.

[3]Since the proposed suspension was withdrawn, it is no longer relevant to this case.

Discussion

Complainant's burden under the Act, as under similar statutes protecting whistleblowers, is to prove by a preponderance of the evidence that: (1) he engaged in conduct protected by the Act; (2) respondent took adverse employment against him; and (3) the adverse employment action was caused all or in part by the protected activity. *BSP Trans, Inc. v. U.S. Department of Labor*, 160 F.3d 38, 46 (1st Cir. 1998; *Yellow Freight System, Inc. v. Reich,* 27 F.3d 1133, 1138 (6th Cir. 1994). Since this case proceeded to a full hearing on the merits, no purpose would be served by determining whether the complainant has established a prima facie case. *Boytin v. Pennsylvania Power & Light Co.*, 94-ERA-32 (Sec'y Oct. 20, 1995). The relevant inquiry is whether, looking at the evidence as a whole, complainant has shown that the disciplinary action was taken because he engaged in protected activity. *E.g., id.; Boudrie v. Commonwealth Edison Co.*, 95-ERA-15 (ARB Apr. 22, 1997). To meet this burden, complainant must prove that disciplinary action was taken, and that respondent's stated reasons for the disciplinary action taken are pretextual, that they were not the true reasons for the adverse action. *Scott v. Roadway Express*, 98-STA-8 (ARB July 28, 1999); *Leveille v. New York Air National Guard*, 1994-TSC-3, 4 at 4 (Sec'y Dec. 11, 1995).

It is unfortunate that this case came to trial. For, in essence, nothing of any consequence happened, and everything has been resolved. Complainant still works for respondent, and has not lost any earnings or benefits. Moreover, his work attendance has improved dramatically. The case should have been resolved with a handshake, not litigation, and if complainant had consulted an attorney I am sure this would have been the outcome.

I find that what happened on February third and fourth was a simple misunderstanding. Respondent believed that on February 3rd, complainant had agreed with the dispatcher to take the Albany and Lebanon trip on February 4th, whereas complainant believed he only agreed to try to make it back from Yakima early enough to take it. When he returned later than expected on February 4th and indicated he did not want to take the trip because he was not feeling well, Martin was unpleasantly surprised and, based on complainant's recent history, believed he was trying to avoid a run he just did not want to take. Martin mentioned that refusing to take a scheduled trip was grounds for dismissal because he was concerned that complainant was refusing to deliver the load without justification. There is no reason to believe that he wanted complainant to deliver the load if complainant actually believed he was not up to driving. In this regard, it should be noted that complainant could not remember another incident where respondent insisted that he drive when he did not believe he was physically up to it (TR 69-74). Finally, a reasonable compromise was reached where complainant was to load his truck on the 4th but not deliver the vehicles until the 5th. Accordingly, complainant was not subjected to discipline on February 4th for failing to operate his truck due to reasonable fear of injury.

Further, the warning notice complainant received on February 13th had nothing to do with complainant's refusal to drive on February 4th. Rather, it was directed to the excessive amount of time complainant spent on February 4th loading his vehicle. Complainant acknowledged that he spent an

unusual amount of time loading his truck on that date. Further, complainant had previously received a warning notice for a similar problem a year earlier (EX 4). I find that the warning notice issued on February 13th was not in retaliation for complainant's refusal to drive on February 4th.

Accordingly, I find that complainant has failed to established that he was discriminated against for engaging in protected activity under the Act, and it is recommended that the complaint be dismissed.

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JEFFREY TURECK
Administrative Law Judge